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OCTOBER TERM 1948

No. 65

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

against

ACME FAST FREIGHT, INC.,

Respondent.

BRIEF ON BEHALF OF PETITIONERS

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Respondent.

BRIEF ON BEHALF OF PETITIONERS

I. Opinions Below

The opinion of the District Court (R. 69-84) is not reported. The opinion of the Circuit Court of Appeals (R. 95-105) is reported in 166 F. (2d) 778.

II. Jurisdiction

This Court has already exercised its jurisdiction under 28 U. S. C. A., § 347(a) to review the instant case by entering, on October 11, 1948, its order granting a writ of certiorari to the Circuit Court of Appeals for the 2nd Circuit (R. 109).

III. Statement of the Case

Respondent, a freight forwarder, brought suit against petitioners, railroads, in the United States District Court for the Southern District of New York, praying for a judgment declaring that respondent as a freight forwarder is a receiving carrier within the meaning of the uniform railroad bill of lading*, that written notice of claim** to respondent within the period of nine months therein provided, satisfies the meaning and purpose of said provisions, and that after receipt of such written notice of claim, respondent, by subrogation to the claims of its shippers sustaining loss or damage in the transportation service of petitioners as respondent's connecting carriers, is entitled to recover from petitioners the amounts which respondent has been obliged to pay its shippers (R. 5).

Respondent moved in the District Court for summary judgment against petitioners Delaware, Lackawanna & Western Railroad Company, Chicago, Milwaukee, St. Paul

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* In its amended complaint (R. 2-6) respondent refers to the bill of lading the forwarder issues to shippers as the uniform railroad bill of lading. Actually, the Interstate Commerce Commission has prescribed the form and conditions of the bill of lading to be issued by railroad common carriers, commonly known as the uniform railroad bill of lading. (Copies are inserted at pp. R-18a; R-18b; R-32a; R-32b; see 14 ICC 346; 52 ICC 671.) However, the Commission has never prescribed use of the uniform railroad bill of lading for forwarders. Respondent's allegation that it issued bills of lading with like terms and conditions to its shippers is nothing more than an allegation that as a convenience to itself it has "lifted" the terms and provisions of the uniform railroad bill of lading and incorporated them into its own bill of lading.

** The amended complaint refers repeatedly to "notice" and "notice of claim" as a requirement of the uniform railroad bill of lading. Such expressions are not found in the uniform railroad bill of lading, but rather Section 2(b) thereof requires: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier * * * within nine months after delivery of the property * * * or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed * * *."

& Pacific Railroad Company and Wabash Railroad Company (R. 47; R. 65) and also moved to strike out the defenses of all the petitioners (R. 60). Petitioners, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, made a cross-motion for judgment on the pleadings (R. 60). All the above motions were argued together and in a comprehensive opinion (R. 69-84) the District Court denied respondent's motions and granted the motions of petitioners, Delaware, Lackawanna & Western Railroad Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Wabash Railroad Company, having considered them as motions for summary judgment. By stipulation and order the cross-motion of said petitioners was amended to include *nunc pro tunc* all the petitioners and to include therein a motion for summary judgment on their behalf (R. 67, 68). The final order of the Court directed judgment dismissing the complaint as against all the petitioners (R. 85, 88) and the respondent appealed to the Second Circuit Court of Appeals from that order.

On March 1, 1948 the Circuit Court rendered its decision (R. 95-105; 166 F. (2d) 778), reversing the District Court and remanding. On May 29, 1948 petitioners filed their petition for writ of certiorari and the petition was granted by this Court October 11, 1948 (R. 109).

The facts of the case are undisputed (R. 49; R. 72) and appear in the amended complaint (R. 2-6), the answers (R. 7-36A) and in the affidavits of William J. H. McEntee (R. 47-59), B. H. Wettlaufer (R. 61-65), H. W. Kerns and William C. Morrow (R. 66-67). The principal facts are as follows:

Respondent is a freight forwarder, and its business is controlled by the provisions of the Freight Forwarder Act, Part IV of the Interstate Commerce Act (49 U. S. C. A. §§ 1001, *et seq.*). Petitioners are common carriers by rail, whose business is controlled by Part I of that Act (49 U. S. C. A. §§ 1, *et seq.*) (R. 2).

The business of the respondent as a freight forwarder, subject to the provisions of Part IV consists of holding itself out to provide transportation of property in interstate commerce. It solicits and receives from various shippers at various assembly points less-than-carload shipments of freight, for the handling of which respondent maintains facilities in the principal cities of the United States. It operates neither rail lines, ships nor motor trucks. In the course of its undertaking of assembling and consolidating shipments, it performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, assumes responsibility for the transportation of such property from delivery of each individual package to it or to a local truckman or a motor carrier until delivery of each package by it or by a local truckman or a motor carrier to the consignee of such package, and utilizes for the whole or part of that transportation the service of carriers which are subject to Parts I, II or III of the Interstate Commerce Act (R. 3, 9, 23).

Individual less-than-carload shipments are either trucked by the consignor or a local truckman to respondent's assembly points or are transported there by motor carrier. In instances of the former, respondent issues to the consignor its bill of lading showing the name of the consignor and the consignee and destination. In instances of the latter the motor carrier issues to the consignor its bill of lading showing the name of the consignor and of the consignee and destination and the respondent adopts the motor carrier's bill of lading as its own as the Statute permits (49 U. S. C. A., § 1013) or on occasion the motor carrier issues a bill of lading in the name of respondent (R. 3, 10, 24).

At the assembly point, respondent sorts the individual package shipments and consolidates them into a volume quantity which is then shipped as a carload shipment by railroad or as truck load shipments by motor common car-

rier to a distant destination which is usually a distribution location of respondent or an associated forwarder (R. 3, 11, 24).

The railroad does not transport such railroad carload shipments under the many bills of lading issued by respondent or the motor carrier to the individual package consignors, but in all instances the railroad issues its own uniform railroad bill of lading to respondent showing respondent as shipper and consignee and the shipment as being a "carload of mixed merchandise". In most instances the uniform railroad bill of lading is stamped "Shipper's load and count" in accordance with the provisions of the Federal Bills of Lading Act (49 U. S. C. A. § 101). The destination named in this uniform railroad bill of lading is a rail destination at which respondent has arranged to take delivery of the carload shipment. Neither the names of the individual package consignors to whom respondent or the motor carrier issued its bills of lading, nor the names of the individual package consignees to whom respondent agrees to deliver the individual packages appear anywhere on the uniform railroad bill of lading issued to the respondent (R. 11, 25).

The transportation of carload shipments by the railroad for respondent is made pursuant to the regularly filed and published classification, tariffs and supplements (R. 67) of the railroad applicable to similar carload shipments of the public generally; the rates charged by the railroad are the regular rates for such carload traffic; respondent is dealt with and treated by the railroad in the same manner as any other shipper or consignee; charges based on the regular tariff rates are either prepaid by respondent to the railroad or paid by respondent to the railroad on delivery to respondent of the carload shipment at the rail destination as in the case of any other shipper or consignee (R. 12, 25).

Upon delivery by the railroad of the carload shipment to respondent at the rail destination, respondent sorts the

carload shipment into its individual component package shipments and delivers, in some instances, the various articles so sorted, by a local truckman or a motor carrier to the individual consignees of each package. However, in other instances respondent reassembles parts of said carload shipment, combines them with other individual package shipments on hand and makes up either a new truckload for further shipment by a motor carrier to a new distant destination or a new carload shipment for further movement by railroad as a new carload shipment. In the latter instance the railroad always issues to respondent a new uniform railroad bill of lading showing respondent as the shipper and consignee as on the first such movement described above (R. 10, 26).

In this manner respondent does business, obtaining transportation across large areas of the country by shipping less than carload freight consolidated into truckload and carload quantities and using motor carrier transportation, or rail transportation or a combination of the two.

The rates charged by railroads on carload shipments are lower than the aggregate charges would be if each of such package shipments were tendered to the railroad as individual less-than-carload shipments. The respondent, however, charges and collects from its shipper or consignee a sufficient tariff charge on each shipment so that the saving it makes in shipping by rail in carload quantities or by motor carrier service in truckload quantities is a sufficient margin to carry on business and make a profit. The railroads do not receive from respondent the charges collected by respondent from its shippers, nor any part thereof; nor do the railroads participate in any division or apportionment of such charges. Conversely the railroads do not share or divide the freight charges collected from respondent with anyone excepting connecting rail and water carriers with which joint through rates and routes are published (R. 13, 27).

The transportation of the carload shipment by the railroad is not on any through routing provided for in the bills of lading issued by respondent or the motor carrier to the package shippers. Rail routing does not appear in such bills and the railroad has no knowledge of such bills and their contents when it accepts and transports the consolidated carload shipment for respondent nor at any time. The uniform railroad bill of lading issued by the railroad to respondent on the carload shipment provides for rail routing only for the carload shipment between rail point of origin and rail destination of such carload shipment (R. 14, 25).

As to claims for loss and damage occurring on a carload rail shipment the uniform railroad bill of lading governing such transportation provides that as a condition precedent to recovery, claim for loss or damage must be filed in writing within nine months of delivery or a reasonable time for delivery; otherwise the claim will not be paid.* During all the times mentioned in the complaint it has been the uniform practice of respondent to comply with this provision of the uniform railroad bill of lading issued to it by filing claims *as shipper.* Respondent has never attempted first to pay a claim to its individual package

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* Section 2(b) of the Uniform Railroad Bill of Lading provides as follows:

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

shipper or consignee and then assert a right-over against a rail carrier and ask reimbursement based upon a judgment, or transcript thereof, procured against respondent or based upon a receipt for a sum paid out, as it is herein asking the court to declare it is entitled to do (R. 15, 29, 63).

Respondent's method of doing business as above described is the same as that found to exist and described in *Acme Fast Freight* v. *U. S.*, 30 F. Supp. 968, affirmed 309 U. S. 638. In that case, decided before the enactment of the Forwarder Act, it was held that respondent was not a common carrier.

There is nothing in the amended complaint or in the proceedings thus far had indicating that any change has taken place in respondent's practices and operations as a freight forwarder subsequent to the enactment of the Forwarder Act in 1942 and the District Court below so found (R. 77). Although, the respondent has always been a shipper in its relations with the carriers, its contention herein is that Section 1013 of Part IV of the Interstate Commerce Act (49 U. S. C. A., § 1013) has brought about a change in its status, *i. e.*, it has become an "initial carrier" as to the package shipments of its shippers; that there is no difference in substance or in form between the package shipments of its various shippers and the consolidated carload shipment which it delivers to the rail carriers for rail transportation in respondent's name; that the rail carriers are its connecting carriers; that the filing of claim with respondent, forwarder, by its individual package shippers, satisfies the claim clause provision of the uniform railroad bill of lading requiring claims to be filed with the "initial carrier"; and as "initial carrier" respondent need not file claims with the "connecting carrier" railroads, but can recover against them under Section 1013 for payment of any claims made against respondent by any of its shippers (R. 29, 63).

IV. Question Presented

The question presented by this controversy is whether, since the inclusion of Part IV in the Interstate Commerce Act the relationship between the rail carrier and the forwarder, shipping a consolidated carload shipment by rail under the terms and provisions of the uniform railroad bill of lading wherein the forwarder is shipper and consignee, is (1) that of shipper and common carrier by rail governed by the terms and provisions of such uniform railroad bill of lading or (2) whether such relationship is that of receiving carrier and connecting carrier governed by the terms and provisions of the various bills of lading issued by the forwarder or its agents to the package shippers who are unknown to the rail carrier.

V. Specification of Errors

Petitioners urge all of the errors specified in the petition to this Court for writ of certiorari in this case. In that petition it was specified that the Circuit Court of Appeals in the Second Circuit had erred:

1. In reversing the judgment awarded in favor of the petitioners dismissing the complaint on the merits.

2. In failing to affirm the judgment below.

3. In failing to hold that the respondent is in all respects bound by the terms of the uniform railroad bill of lading issued to it by the rail carriers for the transportation of the consolidated carload shipment, including the requirement that claims be filed in the manner and time therein specified.

4. In holding that the respondent never has been and was never intended by Congress to become a car-

rier, and at the same time holding that the respondent was an initial carrier.

5. In failing to hold that the respondent was not an initial carrier as to the shipments transported by the rail carriers but was a shipper only, as to such shipments, subject to the rail carriers' carload rates and the terms and provisions of the uniform railroad bill of lading.

6. In holding that the petitioners are bound, in the transportation of the carload shipments received from the respondent, by the terms of the bills of lading issued by the respondent to its individual package shippers, on each package shipment subsequently consolidated into such carload shipments.

7. In holding that the doctrine of *M. K. & T. Ry. Co. v. Ward*, 244 U. S. 383, and similar cases is applicable to the factual situation in this case so as to render void the terms and provisions of the uniform railroad bill of lading issued to respondent forwarder by the rail carriers.

8. In failing to hold that the bills of lading issued by respondent to its customers for the individual package shipments are not through uniform railroad bills of lading and that the petitioners are not parties thereto.

9. In holding that on forwarder traffic, as involved in this case, the rail carriers are connecting carriers only.

10. In failing to hold that the uniform railroad bill of lading issued to respondent forwarder has the effect of limiting any right of recourse or of subrogation, if such right is granted to respondent under Section 1013 of the Interstate Commerce Act, so as to obligate respondent to comply with the claim clause in such bill of lading.

Summary of Argument

This brief for petitioners is written with the purpose of establishing that the relationship between forwarders and rail carriers is, since the enactment of Part IV of the Interstate Commerce Act, as it was prior thereto, that of shipper and common carrier by rail, governed by the terms and provisions of the uniform railroad bill of lading; that forwarder's carload shipments moving by rail are governed by the terms of the uniform railroad bill of lading; and that the forwarder, being a shipper, and shipping under the terms and provisions of the uniform railroad bill of lading, cannot avoid the full application of its terms and conditions, including Section 2(b) thereof.

The petitioners advance the following arguments:

1. **Congress in its enactment of Part IV of the Interstate Commerce Act intended that a freight forwarder should retain its dual personality, i. e., (1) that of a transportation company with respect to its package shippers and (2) that of a shipper with respect to the rail carriers, whose services it utilizes. Being a shipper of its carload rail shipments, it cannot avoid compliance with the terms and provisions of the uniform railroad bill of lading.**
2. **The rail transportation of the forwarder's carload of mixed merchandise could not lawfully be effected except under the terms of the uniform railroad bill of lading issued by the initial rail carrier on such carload shipment.**
3. **The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" with respondent and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable.**
4. **Respondent, a shipper as to the rail carriers, has no right-over against rail carriers under Section 20(11) as incorporated into Section 1013 of Part IV. Were respondent an "initial carrier" as to the railroads any claimed right-over under Section 20(12) is regulated, modified and limited by agreement *i. e.*, Section 2(b) of the uniform railroad bill of lading issued to respondent.**
5. **Conclusion.**

POINT I

Congress in its enactment of Part IV of the Interstate Commerce Act intended that a freight forwarder should retain its dual personality, i. e., (1) that of a transportation company with respect to its package shippers and (2) that of a shipper with respect to the rail carriers whose services it utilizes. Being a shipper of its carload rail shipments, it cannot avoid compliance with the terms and provisions of the uniform railroad bill of lading.

A. Relationship of forwarder to rail carrier prior to 1942.

Prior to the enactment of the Forwarder Act (Part IV, Interstate Commerce Act, 49 U. S. C. A. §§ 1001, *et seq.*) freight forwarders such as the respondent occupied a unique position in the transportation industry. The modern freight forwarder had become possessed of a dual personality.* With respect to its relations with its package shippers (of the miscellaneous package shipments which the forwarder consolidates into a carload) it was a transportation company; while with respect to the rail carrier to whom it delivered its consolidated carload shipment for transportation, in its own name as shipper and consignee, it was a shipper only.

The Interstate Commerce Commission in its report of its investigation of the forwarder business, which preceded

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* In the early law, the forwarder was considered merely an agent for the shipper; with the broadening of the scope of its activities, particularly its agreement to provide transportation from origin to destination, it acquired some aspects of a common carrier in relation to its shippers (see *Kettenhoffen v. Glove Transfer & Storage Co.*, 70 Wash. 645, 127 Pac. 295; 42 L. R. A. (N. S.) 902 annot.; *Slutzkin v. Gerhard & Hey, Inc.*, 199 A. D. 5, 14; *Highway Freight Forwarding Co. v. Public Service Com.*, 108 Pa. Sup. Ct. 178, 164 Atl. 835).

the enactment of Part IV, said:

> "We find that the forwarder as described upon this record, in its relation to the rail lines, is a shipper.
>
> "We further find that the forwarder as described upon this record, in its relation to the public, has characteristics of a common carrier transportation agency and that its regulation as such is not comprehended within the provisions of Part I or Part II of the Act."
>
> *Freight Forwarder Investigation*, 229 I. C. C. 201, 304 (1938).

As such shipper it was, in using railroad services, subject to all the published classifications and tariffs of the railroad and the terms of the uniform railroad bill of lading issued to it, just as in the case of any other shipper.*

The railroad had to treat respondent as any other shipper and could neither give respondent a preference nor discriminate against it.

> *I. C. C.* v. *D. L. & W. R. R. Co.*, 220 U. S. 235;
> *L. V. R. R. Co.* v. *U. S.*, 243 U. S. 444.

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* In *Freight Forwarder Investigation*, 229 I. C. C. 201, 297, it was said:

> "It has long been the law that the carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use; and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed." *California Commercial Assn.* v. *Wells, Fargo & Co.*, 14 I. C. C. 422, 427; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444. The consolidated consignment with which we are here dealing is shipped over the railroad by the forwarder in its name and to itself as consignee. The forwarder, therefore, is the only shipper or consignee known to the railroad in so far as this traffic is concerned. It must be, therefore, that the forwarder as it now operates, in its relation to the railroads, is a shipper."

Forwarders such as the respondent have never been considered carriers in their relationship to rail carriers.*

B. Enactment of law regulating forwarders.

Congress deemed that the business of forwarders required regulation in order to carry out the National Transportation Policy** and in 1942, after much discussion in both the Senate and House, enacted the Forwarder Act,

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* Both the District Court and the Circuit Court of Appeals were in agreement on this point, i. e., that the respondent is not and cannot be a *carrier*. While it may have aspects of a transportation company with respect to its shippers it must remain a shipper in its relations with rail carriers in order to justify its very existence. Its dual personality, by which it can collect shipments for transportation at its own rates, consolidate them and deliver them to the rail carriers for transportation to itself at a lower rate, provides the income and the justification for the existence of such forwarder (Freight Forwarder Investigation, 229 I. C. C. 201, 298).

** National Transportation Policy. Act Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12, and 13 of this title, by inserting before Part I thereof (chapter 1 of this title) the following provision entitled "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

which became Part IV, Interstate Commerce Act (49 U. S. C. A. §§ 1001, *et seq.*).

Since 1886, railroads had been subject to federal regulation under the Interstate Commerce Act (49 U. S. C. A. §§ 1, *et seq.*). In 1935, motor carriers were made subject to federal regulation; the Interstate Commerce Act was thereupon split into parts, the sections regulating motor carriers, being Part II. Subsequently water carriers were made subject to Commission regulation and the sections relating to that type of carrier became Part III. The reason for the separation of the Act into Parts is obvious: motor carriers are neither railroads nor water carriers; water carriers are neither motor carriers nor railroads. Each form of transportation had a nature peculiar to itself and different from the others' and the problems of regulation were different. Had the transportation services of motor carriers and water carriers been similar to railroads there would have been no need for a Motor Carrier Act or a Water Carrier Act, nor the enactment of a distinct statute applicable to each *i. e.*, Part II and Part III respectively of the Interstate Commerce Act. Congress could merely have enacted a law making motor carriers and water carriers subject to regulation by the Commission under the then existing provisions of the Interstate Commerce Act (now Part I).

Similarly, in enacting legislation making forwarders subject to government regulation, if the forwarder was to be a common carrier performing transportation services similar to that of railroads, Congress could merely have so declared and made the forwarder subject to the provisions of the Act applicable to railroads (Part I). This Congress did not do. It made the forwarding business subject to the jurisdiction of the Commission but in a separate statute to be known as Part IV of the Interstate Commerce Act which was to apply to and only to "service subject to" such new Part. The reason is obvious: the railroad is a

common carriers the forwarder is not. As to the railroad transportation services which the forwarder utilizes, *i. e.*, in its relationship with rail carriers, the forwarder is a shipper.

C. Railroad liability under Section 20 (11) of the Interstate Commerce Act.

A consideration of the relationship of common carrier railroads, *inter sese*, and their liability to shippers for loss and damage on freight transported is at this time helpful in an orderly presentation of the issues involved in this action and in explanation of the National Transportation Policy, conformity with which is the fundamental test to be applied to the controversy herein.* The statute as amended governing such relationship and liability is commonly referred to as the Carmack Amendment.

Section 20(11), 49 U. S. C. A., § 20(11), in substance, provides:

> "Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation. * * * shall issue a receipt or bill of lading therefor, and shall be liable * * * for any loss, damage or injury to *such property* caused by it or any common carrier, railroad, or transportation company to which *such property* may be delivered * * * when transported on a *through* bill of lading * * * and any such common carrier, railroad or transportation company so receiving property for transportation * * * or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable * * * for the full actual loss caused by it or by any such common carrier, railroad or transportation company to which *such property* may be delivered * * * when transported on a through bill of lading * * *." (Italics supplied.)

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*See footnote **, p. 14 *supra*.

Section 20(12), 49 U. S. C. A. § 20, provides:

> "The common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property *so received and transported*, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of *such property*, as may be evidenced by any receipt, judgment, or transcript thereof * * *." (Italics supplied.)

It should be noted that under Section 20(11) above, the initial common carrier, railroad or transportation company is liable for loss or damage occurring anywhere in the transportation only when the transportation is on a *through* bill of lading. The right-over of such initial common carrier railroad or transportation company in the event of its payment or liability to payment of a claim, to recover from the common carrier, railroad, or transportation company on whose line the loss or damage occurred is dependent upon the latter having transported the shipment on its line and pursuant to the *through* bill of lading. Respondent does not bring itself within such requirement because the transportation by rail is not under the terms and provisions of any of the bills of lading issued by respondent or its agent but rather under the terms and provisions of the uniform railroad bill of lading.

Prior to the effective date of the Carmack Amendment of 1906, railroads were so associated in practice in the handling and interchanging of traffic that a shipment, carload or less-than-carload, could be made from practically any point in the United States to practically any other point, as if over one continuous line; and by the publication of tariffs the railroads had often joined one with another to provide through routes, with joint or through rates applicable to shipments over such routes. Nevertheless, it

was common practice for each railroad to limit its liability solely to the transportation over its own line. The initial rail carrier in making the contract with the shipper for the through transportation might limit its liability for damage to that occurring on its own line; it could agree not to be liable for damage caused by any connecting or subsequent rail carrier. To remedy this condition the Carmack Amendment of 1906 (now Section 20(11) and (12), 34 Stat. 595, Chap. 3591) was added to the Interstate Commerce Act (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186);* and imposed on the initial rail carrier an undertaking it previously might avoid by making it liable for damage occurring on any other railroad over which the shipment was moving on a uniform railroad bill of lading between the origin and destination named therein.** Because the railroads, in practice, operated as one system on through routes, with joint or through rates frequently established, their method of doing business made necessary the imposition of initial railroad liability to the shipper, and the

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* Congressman Richardson in explaining the purpose of the Amendment to the House, said (40 Cong. Rec., p. 9580) as to the reason for making the initial carrier responsible for loss or damage:

> "The reasons for inducing us to do that were the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and the settlement between them will be an easy matter, while the shipper would be at a heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the cooperation, the through route courtesies between them would be broken up if prompt payment were not made. We have done that in conference."

** The requirement in the present wording of Section 20(11) that the respective liabilities of the rail carriers to the lawful holder of the bill of lading and *inter se* is dependent upon the property being transported on a *through* bill of lading was not in the Carmack Amendment as enacted into law in 1906. That provision was added by the First Cummins Amendment in 1915.

initial railroad was compensated with the right over (Section 20(12)), against the railroad at fault (*Atlantic Coast Lines* v. *Riverside Mills* (*supra*)).

Prior to enactment of the Forwarder Act (49 U. S. C. A. §§ 1001, *et seq.*) the Carmack Amendment had no application to the contracts between the forwarder and its individual package shippers, even though the forwarder had, after consolidating the package shipments into a carload quantity, shipped such carload over railroad lines under the terms and provisions of the uniform railroad bill of lading. The Carmack Amendment (49 U. S. C. A. § 20(11)) did apply to the contract made between the forwarder *as shipper* and the railroad. The rights and liabilities as between the freight forwarder (as shipper of such carload shipment) and the rail carriers were governed by the uniform railroad bill of lading and Section 20(11).

The contracts the forwarder made with its individual package shippers were not binding on the railroads, the railroads were not parties to such contracts and the railroad transportation of the carload shipment was not under or pursuant to such contracts. As in the case of any other shipper, the terms of the uniform railroad bill of lading issued by the railroad to the forwarder as shipper of a carload shipment governed the transportation. Thus, when loss or damage occurred, and the forwarder's individual consignor attempted to sue a railroad, the uniform railroad bill of lading which had been issued to the forwarder became the sole measure of the railroad's contractual liability.

Great Northern Ry. Co. v. *O'Connor*, 232 U. S. 508.

D. The Forwarder Act of 1942 did not and was not intended to change the existing status.

(1)

The underlying theory of respondent's position herein is that, since enactment of the Forwarder Act in 1942, respondent, when it issues its bill of lading to its consignor on a package shipment becomes the "initial" or receiving "carrier" of the shipment; that when it subsequently ships via railroad facilities a carload quantity comprised of a consolidation of a large number of such small package shipments, the railroad becomes respondent's "connecting carrier" as to each and every unit or package shipment comprising the carload; and that the uniform railroad bill of lading issued by the rail carrier as required by Part I of the Interstate Commerce Act is a nullity and of no force and effect.

The specific provision of the Forwarder Act which respondent contends transforms the forwarder from shipper to "initial" or "receiving carrier" is the following of Section 1013 (49 U. S. C. A., § 1013):

> "§ 1013. The provisions of Section 20(11) and (12) of Part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, *in the case of service subject to this part*, with like force and effect *as in the case of those persons to which such provisions are specifically applicable*, and the freight forwarder shall be deemed both the receiving and the delivering transportation company for the purposes of such Section 20(11) and (12). * * *" (Italics supplied.)

Respondent's argument amounts to the contention that the passage of Section 1013 changed the relation between

forwarders and rail carriers, made the forwarder an initial carrier or transportation company as to rail carriers, abrogated the provisions of Part I of the Interstate Commerce Act requiring rail carriers to issue uniform railroad bills of lading for all shipments received by them and wiped out respondent's status as a *shipper*. That argument is predicated upon the fact that Section 1013 regulates forwarders, i.e., since the forwarder is made to respond to its shippers by that statute, then it has a statutory right of "recovery over" against the rail carriers. However, Section 1013 regulates a forwarder in its aspect of a transportation company, *not* in its aspect of a shipper. That Section cannot give a forwarder immunity from the duties and obligations which arise from its relationship as *shipper* with rail carriers or relieve the rail carriers from their statutory obligation to issue to respondent a uniform railroad bill of lading and to comply with the provisions thereof. The dual personality which exists in the forwarder type of transportation company must not be lost sight of in considering this issue for it gives the key to the meaning of the statute and to the Congressional intent.

No such result as contended by the respondent could have been legally or practically intended by Congress and so to construe Section 1013 would be revolutionary, if not catastrophic to the National Transportation Policy. Insofar as the forwarder is regulated as a transportation company, it can recover over under Section 1013 against any other transportation agency with which it deals in its capacity of a transportation company and with which it publishes through rates and routes. It cannot, however, recover over under Section 1013 against a rail carrier for no through rates and routes are published or are permitted to be published by rail carriers and forwarders and the forwarder does not in its transactions with a rail company deal with it as a transportation company but contractually as a shipper.

Section 20 (11) (49 U. S. C. R. § 20(11)) as amended by the First and Second Cummins Amendments brought about the regulation of initial rail carriers—not as between carriers—but in their relations with their shippers. The relation of connecting rail carriers as between themselves and the relation between the shippers and connecting carriers where the rates and routes were published remained unaffected (*Oregon-Washington Co.* v. *McGinn*, 258 U. S. 409, 413).

Section 20(12) (49 U. S. C. A. § 20(12)) gave a right-over to the initial or delivering rail carrier, which was called upon to satisfy the claim of the shipper or consignee, as against the rail carrier on whose line the loss or damage actually occurred. *Atlantic Coast Lines* v. *Riverside Mills, supra.* The enactment of Sections 20(11) and (12) did not affect the status of the shipper or change his relation to the carriers in respect to his contract obligations. The shipper might recover against the initial or delivering carrier but he was still the shipper and bound by the terms of the uniform railroad bill of lading issued by the initial rail carrier—whether he sought to recover from the initial carrier or delivering carrier under the statute or from the connecting rail carrier under its common law liability (*Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, 241 U. S. 190).

Likewise, the enactment of Section 1013 was not meant to change or affect the status of the forwarder in the case *where it is a shipper, i.e.*, in its relationship with rail carriers. The very section itself limits the application of Sections 20(11) and (12) so that they apply "* * * with like force and effect as in the case of those persons to which such provisions are specifically applicable * * *." Section 20(12) which is the one giving the right of recovery over and upon which the respondent relies is not "specifically applicable" to shippers in Part I. In fact it is not applicable to shippers at all. Therefore, Section 20(12) as

incorporated into Part IV from Part I by Section 1013 has no application to forwarders as shippers.

The enactment of Section 1013 did, however, affect the forwarder in its relation as a transportation company—in its dealings *with its shippers* and with those motor carriers and other forwarders whose contracts were either issued on its behalf or adopted by the forwarder.* In its relations with the latter—the motor carriers and other forwarders—the transportation provided by the forwarder was and is done on its contracts with its shippers. It is to be borne in mind that in all forwarder traffic some forwarder transportation and service to the shipper both precedes and follows the rail carriage, if there is a rail movement. It is the transportation and service other than the rail transportation that is subject to Part IV and makes necessary the application of Section 1013. As there is no contractual liability on the part of the motor carrier or other forwarder handling the shipment for the freight forwarder, at either origin or destination or for all or part of the through movement, to indemnify the freight forwarder for any judgment or liability, it might be called upon to pay for loss or damage occurring while the shipment is in the possession of such motor carrier or other forwarder, whose bill of lading the freight forwarder may have adopted, it was necessary for Congress to adopt Section 1013.

With respect to rail carriers an entirely different picture obtains—based upon the dual capacity and personality of this two sided transportation company, the forwarder. With respect to forwarders' transactions with rail carriers, *as shippers*—there is a contractual liability of such rail carriers, under the initial rail carrier's uniform railroad bill of lading and Section 20(11) of Part I of the Interstate Commerce Act which gives full recovery to the forwarder, *as shipper*, for any loss or damage to its carload shipment

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* For practices in issuance of bills of lading pursuant to Section 1013, see footnote *infra*, p. 26; also *Bills of Lading of Freight Forwarders*, 259 I. C. C. 277.

which may have occurred while in the possession of the rail carriers. As shown by the facts in this case, which are the same as those before the Court and the Interstate Commerce Commission in *Acme Fast Freight* v. *U. S.*, 30 F. Supp. 968, affirmed 309 U. S. 638, and *Freight Forwarder Investigation*, 229 I. C. C. 201, the only relation which the forwarder has, or can have with the rail carriers (whether the initial, delivering or connecting rail carrier) is the relationship of shipper.

A consideration of the various sections of the Forwarder Act (49 U. S. C. A. §§ 1001, *et seq.*) further shows that that Act was not intended to change the status of a forwarder in its relations with the railroads from that of shipper to that of initial carrier.

(a) A freight forwarder is defined in Part IV as follows (49 U. S. C. A., § 1002 (5)):

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to Chapter 1, 8 or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to Chapter 1, 8 or 12 of this title."

(b) By Section 1009 the forwarder was authorized to continue for a time the existing joint rate arrangements with motor carriers subject to Part II of the Interstate Commerce Act pending establishment of assembling and distribution rates.* By amendments this period of time was extended until by amendment of February 20, 1946, authorization for continuance of the joint rate and division arrangements between forwarder and motor carrier was granted without restriction as to expiration date, subject to the authority of the Commission.**

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* From the explanation of the Forwarder Bill to the House by Rep. Wolverton (87 Cong. Rec. Part 8, pp. 8218-19) it appears: Forwarders were closely identified with the motor carrier industry; through-routing, common arrangement and division of the through rates were the general practice; with regulation of motor carriers (1935) the joint rate tariffs were held unlawful by the Commission, the forwarder not being deemed within the Act (the Commission was upheld: *Acme Fast Freight Inc.* v. *U. S.*, 30 Fed. Sup. 968, aff. 309 U. S. 638); the Commission likewise was upheld in suspending motor carrier proportional rate tariffs on forwarder service (*U. S.* v. *Chicago Heights Trucking Co.*, 310 U. S. 344); however, the orders suspending such tariffs were extended and never made effective; that in drafting the Forwarder Act cognizance was taken of existing practices and continuance of forwarder-motor carrier service under joint rates agreements was authorized for a period of 18 months. In anticipation of discontinuance of such joint rates, assembling and distribution rates (i. e. pick-up and delivery rates) were permitted to be published and to be permanently effective; it was believed that authority for such rates, which required publication, was a better solution than a joint rate because division agreements are not required to be published; the railroads and water carriers were permitted under Section 1008 to publish assembling and distribution rates in forwarder service in order to equalize their advantages with motor carriers.

** From the House Report of Rep. Boren accompanying H. R. 2764 (amendment to Section 1009 and which became law Feb. 20, 1946) it appears: that the joint rates arrangements between forwarder and motor carrier were still continuing; that the assembly and distribution rates provided for by Section 1008 in 1942 had never been published due to failure of agreement as to same; that the joint rates arrangement were to be continued with power in the Commission to suspend same, or substitute assembly and distribution rates. (Report No. 1516; H. R. 2764; 79th Cong. 2nd Session.)

But nowhere in the Forwarder Act (Part IV) or in Part I (Railroads) is authority granted by Congress for the forwarder and a railroad to enter into joint or through rate or through route arrangements.* In the absence of such authority, these are prohibited (*Acme Fast Freight Inc.* v. *U. S.*, 30 Fed. Supp. 968, at 97[illegible] aff. 309 U. S. 638).** And the prohibition indicates clearly an intent to preserve the shipper status of the forwarder in its relations with rail carriers.

(c) No authority is found in either Part I or Part IV for a railroad to give any untlue or unreasonable preference or advantage to a forwarder, either in rates or practices. In fact, Section 1004(c) specifically prohibits any such preference or advantage, and in so doing envisages the continuance of the shipper status of a forwarder in its relations with rail carriers.

(d) Nowhere in Part IV is a forwarder referred to as a "common carrier" or even "carrier". As originally enacted, Part IV referred to a forwarder as "carrier" in only one place (Section 1017(b)), and that occurred through an error in drafting. That error was promptly

*Congressman Wolverton in a report to the House on October 23, 1941, on the bill which later became the Forwarder Act (49 U. S. C. A. § 1001), said (Cong. Rec. vol. 87, Part 8, p. 8218):

> "The maintenance of a joint rate by a carrier and a shipper would be an absurdity. If nevertheless permitted, it would enable such shipper to receive rebates through the medium of divisions of the joint rate."

**However, both motor carriers (49 U. S. C. A. § 316(c)) and water carriers (49 U. S. C. A. § 905(b)) are authorized to enter into joint rate and through route arrangements with railroads.

corrected by Congress through an amendment striking the word "carrier" and substituting "freight forwarder".*

In fact, Congress, in its definition of a forwarder (Section 1002(5)) specifically excluded it from the category of a common carrier or carrier:

> "The term 'freight forwarder' means any person which (*otherwise than as a carrier subject to* Part I, II or III of this title) * * *". (Italics supplied.)

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* As originally passed and effective May 16, 1942, Section 1017 (b) referred to the forwarder as "carrier". An amendment to this section, effective August 6, 1942, struck out "carrier" and substituted "freight forwarder". In explanation of this amendment (S. 2642) Senator Reed said (Cong. Rec. Vol. 88, Part 5, p. 6115) that the drafting service had made a mistake as to that one word and the purpose of the bill was to correct the error, and continued:

> "When we passed the so-called freight forwarders' legislation there was some question as to whether or not a freight forwarder was a common carrier. The Senate bill offered no difficulty with that subject. We did not treat a freight forwarder as a common carrier. We passed Senate bill 210, which went to the House and was referred to the Committee on Interstate and Foreign Commerce. In the House there were a number of bills dealing with the subject. The House struck out everything after the enacting clause and substituted one of its own bills.
>
> "When the conference committee finished its work we thought we had a perfect bill. Later it was found that the drafting service had made a mistake as to one word, so Senate bill 2642 was introduced for the purpose of correcting that error. *At one place in the bill which was passed reference was made to a freight forwarder as a carrier. We desire to correct that reference.*" (Italics supplied.)
>
> "When Senate bill 2642 was introduced it went to the Interstate Commerce Commission. The Commission called our attention to another error which had existed in the Interstate Commerce Act for several years and suggested that the bill be amended so as to correct both errors.
>
> "There is no question involved except correcting the language of the Interstate Commerce Act in two places. In one place we propose to change the word 'carrier' to 'freight forwarder'. In another place we propose to change the words 'this part' to 'this act'".

Parts I, II and III *cover all common carriers* engaged in interstate commerce (except airplanes which are regulated under a separate Act, 49 U. S. C. A. §§ 401, *et seq.*)

(c) Nowhere in Part IV is there any express word, language or phrase stating that the status of a forwarder as to a railroad whose services it utilizes has been changed from that of shipper. On the contrary the framers of the Forwarder Act had in mind the preservation of the then existing status.*

Furthermore, Part IV is interpreted by the Commission as making no change in the status of a freight forwarder as shipper with respect to the railroads. In *J. B. Kelly Freight Forwarder Application*, 260 I. C. C. 315, 321, the Commission said:

> "* * * Nowhere in Part IV is a freight forwarder as such referred to as a 'carrier', and from the history of this statute, more particularly the various bills that were introduced in Congress and the committee

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* "Close analysis developed that in many respects freight forwarders, as regards their relations with the actual carriers, are properly to be considered not as carriers but as shippers, and because of this essential difference in character it became necessary to recommend a form of legislation in keeping with that character. Only so, could gross discriminations against other shippers be avoided."

Congressman Youngdahl, on the Forwarder Bill, Oct. 23, 1941—Cong. Rec. Vol. 87, Part 8, p. 8223.

"Even though they may assume or incur the obligations of a common carrier toward their own shippers, forwarders nevertheless stand in the role of shippers with respect to the actual carrier whose services they utilize. Such distinctions between forwarders and carriers subject to the Interstate Commerce Act made it necessary to vary, in some respects, the pattern of the regulation to be proposed for them from that which has heretofore been applied to the actual carriers of freight."

Congressman Wolverton in Conference report of May 11, 1942, Cong. Rec. Vol. 88, Part 3, p. 4065.

reports and debates thereon, it seems clear that Congress deliberately refrained from so designating freight forwarders. Prior to the enactment of Part IV, the Commission and the courts had found that in their dealings with the rail carriers freight forwarders had the status of shippers, although in their relation to the public they had characteristics of a common-carrier transportation agency. *Freight Forwarder Investigation*, 229 I. C. C. 201; *I. C. C. v. D., L. & W. R. R. Co.*, 220 U. S. 235."

(f) With respect to Section 1013 as incorporating therein Sections 20(11) and (12) of the Interstate Commerce Act, such incorporation is for a limited purpose only.* By the very terms of Section 1013, Sections 20(11) and (12) as incorporated therein are made applicable "in the case of service subject to this Part", *i. e.*, service under Part IV. Thus in the service subject to Part IV where the forwarder is performing its service to its shippers—

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* The Court below erred when it held that "* * * for the limited purposes of that section a forwarder is to be treated as a carrier" (R. 100). The intent of Congress, as pointed out heretofore, was *not* to make a forwarder, in its relations with rail carriers, a carrier. The Court itself said in speaking of the Congressional intent:

> "To subject forwarders to the control of the Interstate Commerce Commission it was not necessary to make them over into carriers, and indeed, in view of their operations, it would have been a strange linguistic feat for Congress to have done so" (R. 99).

But the holding that a forwarder is for the limited purposes of Section 1013 to be treated as a carrier, is inconsistent with the general conclusion that forwarders are not carriers. It is submitted that the Court below failed to discern the intended limit of the application of the statute, which results from the dual personality of a freight forwarder. If it had not done so the correct and only conclusion at which it could have arrived was that the application of Section 1013 is limited to that aspect of the forwarder's dual personality wherein it operates as a transportation company and wherein it deals in that capacity; i.e., (1) prior to the point at which it is a shipper over rail carriers, and (2) after the rail transportation has ceased.

as receiving or delivering transportation company—Sections 20(11) and (12) are made applicable. But those sections cannot apply to the forwarder in its character as a shipper—in its relations with rail carriers in the shipping of a forwarder's consolidated carload shipments. That Congress intended that there be such limitation on the application of Sections 20(11) and (12) as incorporated in Section 1013 is further shown from the specific language of the latter section. It provides that:

> "* * * Sections 20(11) and (12) of Part I * * * shall apply with respect to freight forwarders * * *, in the case of service subject to this Part, with like force and effect *as in the case of those persons to which such provisions are specifically applicable* * * *." (Italics supplied.)

Section 20(11) as originally enacted in the Carmack Amendment did not, and has never been construed to, fix any liability upon *shippers* in their transactions with rail carriers. Nor has Section 20(12) of the Carmack Amendment ever been construed to apply to shippers so as to give them a right-over (by subrogation or otherwise) against rail carriers.

This construction of the application of Sections 20(11) and (12) as incorporated in Section 1013 does not affect the forwarder's liability towards its shippers; nor the forwarder's rights against those carriers with whom the forwarder does not have relations of a shipper but does have the relations of a transportation company and with which it publishes through rates and routes. In other words, the liability of the forwarder with respect to its shipper is the same in any case. But to say that the freight forwarder, a shipper, has a right to recover as a receiving common carrier against rail carriers under Section 20(11) and that it has a right to "recover-over" in the same capacity against rail carriers, under Section 20(12) is to disregard the relationship existing between

the rail carrier and the forwarder under the terms and provisions of the uniform railroad bill of lading which shows the forwarder as the shipper and consignee.

The service of rail transportation is regulated in Part I of the Act and consequently rights and liabilities of rail carriers cannot constitute "service subject to this Part", i. e., Part IV.

On the other hand Part IV provides for common arrangements between different forwarders as to which the application of the Carmack Amendment and the right-over section is appropriate. For example, forwarders are permitted joint carload loading arrangement among themselves in the transportation between assembling and distribution point (49 U. S. C. A. § 1004(d)). An example of such arrangement is described in *General Carloading Co., Inc.; Freight Forwarder Application*, 260 I. C. C. 345. On such joint carload the railroad issues only one uniform railroad bill of lading with one of the forwarders described as shipper. In the event of damage to the other forwarder's shipment and payment of claim by it, it has the right-over for recovery against the forwarder to which the uniform railroad bill of lading was issued, for the latter alone can maintain an action against the railroad responsible.*

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* The incorporation of Sections 20(11) and (12) is also applicable to certain arrangements between forwarders and motor carriers. Immediately following the language contained in the first part of Section 1013 authorization is given whereby the motor carrier *may with the consent* of the forwarder execute the bill of lading for the forwarder. Under the provisions of Part II the motor carrier can issue the bill of lading in its own name on its behalf. Similarly, in making final delivery of the package shipment to the ultimate consignee, the motor carrier "may" issue the freight bill on behalf of the forwarder or under Part II the motor carrier may issue the freight bill on its own behalf. These features are common to arrangements for through routing. Nevertheless Section 1013 provides that whether the motor carrier or forwarder issues the bill of lading, regardless in whose name issued, and regardless

(*Continued on following page*)

(g) In addition, it was not the intent of the bill (S. 210, which is now Part IV) to change the then existing status, by making the forwarder thereafter "receiving carrier" as to the railroad whose services it utilizes *as shipper* and by making the railroad a "connecting carrier". We respectfully call the attention of the Court to the following excerpt from remarks of Representative Wolverton in the course of his explanation to the House of the bill and the report of the committee thereon on October 23, 1941 (Cong. Rec. Vol. 87, Part 8, p. 8220):

> "In its explanation of section 413 [49 U. S. C. A. § 1013] the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20(11) and (12) of part I applicable to freight forwarders. It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, the latter is the only person to which such shipper is entitled to look for recovery of damages, and it is in this sense that the forwarder is to 'be deemed both the receiving and delivering transportation company'. If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right to subrogation under section 20(12), since its own shipper never had any right of action against such carrier. The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in

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of whether the motor carrier issues the freight bill to its consignee in its own name or that of the forwarder, "* * * the freight forwarder shall be deemed both the receiving and delivering transportation company for the purpose of such section 20(11) and (12)."

Contrarywise, it is to be noted that nowhere in either Part I or Part IV is authority given to a railroad to issue to the forwarder's shippers any bills of lading in its own name or in that of a forwarder.

section 413 to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved" (p. 8220).

The statement of Representative Wolverton "that the forwarder has no right of subrogation under Section 20 (12)" goes to the heart of the case and destroys respondent's theory. Obviously recognizing this, respondent endeavors to create the impression that Representative Wolverton's remarks on this subject were of a dissenting nature, or, in other words that Mr. Wolverton disagreed with the views of the Committee as a whole. An examination of the Congressional Record dispels the view that Representative Wolverton entertained views different from those of the Committee as a whole. His remarks above quoted, correcting the report of the Committee, were made in the course of a speech in the House in explanation of the bill and of the Committee's report. He was a member of the Committee and was furthering the bill. Prefacing the remarks just quoted and his explanation of the bill, Representative Wolverton also said (Cong. Rec. Vol. 87, Part 8, p. 8216):

> "In some respects the report which accompanies this bill is not as complete as it might be. Due to limitations of time the report was not submitted to the members of the committee or subcommittee, and therefore it may not be out of place to include in these remarks some further explanations which may be helpful to the Members in their consideration of the measure. In a few instances, which will be mentioned later, the report may not be so phrased as to convey fully the sense of what was intended.
>
> "In addition there has come to the attention of the committee certain criticisms of the bill by some of the trucking interests as to which the members would doubtless be interested in knowing the conclusions of

the committee. *For these reasons I shall endeavor to clarify the views of the committee in respect of these several matters.* In order, however, that what is said with respect to individual points shall appear in its proper relation to the subject as a whole, I think it will be of interest to the Members of the House if I first briefly sketch the development of forwarding operations in recent years". (Italics supplied.)*

(b) To summarize: Prior to the passage of the Forwarder Act the relationship between forwarder and railroad was that of shipper and carrier, and the forwarder was bound by the terms of the rail carrier's uniform railroad bill of lading. The foregoing paragraphs indicate (1) that the legislative history shows that it was not the intent of Congress in enacting Part IV to change that situation; (2) that there is no language in the Act expressly effecting a change; (3) that the definition of a forwarder negatives a change; (4) that the prohibition against preference and the

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* In presenting the bill (S. 210) for consideration of the Whole House, Committee Chairman Lea spoke briefly as to the purposes of the bill. He did not refer to the Committee Report on the bill. He was followed by Representative Wolverton, one of the members of the Committee, who made the only detailed explanation of the bill given at any session of Congress. The excerpt printed on pages 33, 34, *supra*, is from that detailed explanation. He was followed by other members of the Committee making brief statements. Neither Chairman Lea nor any other member of the Committee stated or intimated that their views or the purpose of any section of the bill were different than as stated by Representative Wolverton. At the close of discussion on the bill and before offering the bill to the full House, Chairman Lea said (87 Cong. Rec., Part 8, p. 8227):

"The gentleman from New Jersey (Mr. Wolverton) as the ranking minority member, gave unstinted work to these problems and with an ability of which every member of the committee is well aware. I appreciate his good support of this measure today as well as to the fine contributions he has made to other important measures we have brought to the House in recent years."

absence of authority for through routes or joint rates or any common arrangement for rates negatives the implication of a change; (5) that the Interstate Commerce Commission has found no change; (6) that Section 1013, upon which respondent relies, is limited in its application to "the case of service subject to this Part,"—i. e. forwarder service—and so does not effect, and was not intended by Congress to effect, a change and (7) that Section 1013 specifically limits the application of Sections 20(11) and (12) as incorporated therein to "those persons to which such provisions are specifically applicable" under Part I. Accordingly the conclusion is inescapable that as no change has been effected by the Act, the preexisting relationship between respondent and the rail carriers still obtains. Respondent is still a shipper and petitioners are still not connecting carriers; respondent is still bound by all the terms and provisions of the uniform railroad bill of lading, including the claim clause. The right of action of respondent, and its shipper, if any, against the railroad is governed by the terms and provisions of the uniform railroad bill of lading issued by the railroad to respondent.

Great Northern Ry. Co. v. *O'Connor*, 232 U. S. 508.

(2)

The effect of holding a railroad to be a "connecting carrier" to respondent under the provisions of Section 1013 would be, respondent contends, to make void the bill of lading issued by the railroad to respondent on the carload of consolidated package shipments.* If this effect did follow respondent would then be in the preferred position of not having to file any claim for loss or damage with the railroad and not being bound by any of the other terms

* But see Point II *infra*.

and provisions of the uniform railroad bill of lading. And under Section 20(12) as incorporated into Section 1013, respondent instead could then bring an action on any claim paid, or judgment paid or which it was required to pay, and would be limited as to time in such action only by the various State statute of limitations. There is no statute of limitations provided in Section 20(12) and no other provision for limitation of time in the Interstate Commerce Act is applicable.

The discrimination of such result is apparent. A forwarder is not the only type of shipper which assembles and consolidates small unit shipments into carload quantities and utilizes rail facilities to benefit by the lower carload rates. There are many types of such shipper engaged in such practice who are not forwarders and not restricted or benefited by the regulations imposed by the Interstate Commerce Act.* Congressman Wolverton in discussing these shippers in Report to the House on S. 210, the present Part IV, said:

> "For many years shippers have pooled their shipments of less-carload freight and consolidated them into carloads to obtain the benefit of the carload rates, which are lower than the less-carload rates. Some of these operations are cooperative in character; and others though handling a single general commodity such as paper or furniture, and in fact serving the same essential purpose of a cooperative, are conducted for profit among the members of a particular trade or industry." *Cong. Rec.*, Vol. 87, Part 8, page 8216.

The shippers referred to by Representative Wolverton must file claim in writing with the railroad within nine months of delivery. The resulting discrimination against such shipper and the preference thereby accorded the for-

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* See Exemptions, Section 1002(8) (3).

warder would not only be in conflict with Sections 2 and 3 (Part I) of the Interstate Commerce Act but would also be in conflict with the Forwarder Act itself. Section 1004 (c) specifically prohibits a railroad subject to Part I from giving undue or unreasonable preference or advantage to a forwarder.

It seems hardly likely that such a result, so out of harmony with the whole regulatory scheme of the Interstate Commerce Act and the National Transportation Policy, could have been intended by Congress.

The basic reason for requiring a claim in writing to be filed within nine months is to enable the railroad to make investigation while memories are fresh and records in existence. It also makes for the orderly conduct of the railroad business. But to permit respondent the right-over under Section 20(12), limited only by the local statute of limitations would place a serious hardship on the railroad. Most railroad records are destroyed after two years, unless claim be filed and the railroad has reason for keeping them.* In the matter of respondent's shipments, the railroad would in most instances be in position of defending a claim payment on which its records had been destroyed and after memories had grown stale.

Other unduly discriminatory and absurd results would follow the construction of Section 1013 contended for by respondent. For example, the railroad demurrage tariff (R. 67) provides in general that detention of a car by a

* In "Regulations to Govern the Destruction of Records of Steam Railroads" the Interstate Commerce Commission has prescribed the time within which records must be retained, by order made and entered April 20, 1945, and currently effective. The major portion of records pertaining to shipment and transportation must be retained for varying periods from one-two years; after that time the railroad is at liberty to destroy them; in practice such records are destroyed after two years, if no claim is filed or there is no reason to believe claim will be filed, because of limitation of storage space.

shipper (a) for loading and (b) for unloading, for longer than a period of 48 hours beginning at the first 7:00 A. M. after placement, renders the shipper liable for detention at so-much per day, the charge being progressive. But such demurrage is chargeable *only* to shippers or consignees. If the respondent be an "initial carrier" to the railroads, it escapes liability for this charge, and thus obtains an undue preference (*I. C. C.* v. *Chicago Great Western Rwy. Co.*, 141 Fed. 1003; affd. 209 U. S. 108; *Chesapeake & Ohio Ry. Co.* v. *U. S.*, 11 Fed. Supp. 588, affd. 296 U. S. 187).

Again, the bill of lading issued by railroads provides (Section 4(a)), (R. 34A) that in certain instances at destination after a specified period for unloading has elapsed the railroad as to the shipment has the liability of a warehouseman only in the matter of loss and damage, *i. e.*, negligence of the railroad must be proved as a fact (See *Prescott* v. *Southern Rwy. Co.*, 240 U. S. 632). The provisions of said Section 4 (a) apply to shippers (or consignees) only and if respondent be considered as an "initial carrier" and as a "connecting carrier" the railroad's liability after expiration of free time would continue to be that of a connecting common carrier as to respondent. Respondent would be the beneficiary of an undue preference under such a strained interpretation of Section 1013 and would be acquiring all the benefits accorded to a shipper under Section 20(11) and all the benefits of an initial carrier against a connecting carrier under Section 20(12).

It is an established practice in statutory construction that an interpretation which produces absurd results should be avoided. In *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, it was said (p. 543):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of

themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words * * *."

It is submitted that the status of a forwarder as shipper with respect to consolidated carload shipments moving by railroad under and pursuant to the terms and provisions of the uniform railroad bill of lading issued to the forwarder by the receiving rail carrier, which has long been recognized by the Courts, the Interstate Commerce Commission and the National Transportation Policy, should not be overturned by the Courts and the forwarder held to be an "initial carrier" and a "delivering carrier" *vis-a vis*, the railroad, unless contained in an explicit legislative enactment, which is absent in this instance.

POINT II

The rail transportation of the forwarder's carload of mixed merchandise could not lawfully be effected except under the terms of the uniform railroad bill of lading issued by the initial rail carrier on such carload shipment.

The property tendered to respondent for which it or its associated motor carrier issues a bill of lading is not the same property that is tendered to the railroads. Respondent receives a less-than-carload lot. What respondent delivers to the petitioners is not that less-than-carload lot, but a combination of such less-than-carload lots, which

is delivered to the petitioners as a carload shipment. It necessarily follows that the railroad does not transport the same less-than-carload shipment on the bill of lading issued by the forwarder to the package shipper. The less-than-carload or package shipment is consolidated by the forwarder with multifarious other package shipments, and then the consolidated bulk—in which the individual units have lost their identity—is tendered to the initial rail carrier as a new, single, independent carload shipment. On this new shipment there is issued to the forwarder by the railroad the prescribed uniform railroad bill of lading showing respondent (not respondent's numerous consignors) as shipper and consignee of the carload. The shipment is described as "carload of mixed merchandise", and the destination is shown as a rail destination at which respondent forwarder has a place of business, and at which destination delivery is made by the railroad to the forwarder as consignee. The individual names of respondent's individual shippers or consignees do not appear on the uniform railroad bill of lading issued by the railroad to the forwarder and neither does the origin and final destination of any package shipment. The railroad has no knowledge or information as to such facts.*

When a railroad receives a carload shipment from a forwarder there must be a uniform railroad bill of lading issued by the railroad on such carload shipment. It could not be otherwise, for if the shipment received by

*The Consolidated Freight Classification (R. 67) to which petitioner railroads are a party, which is published and lawfully on file with the Commission, and which contains the rules and regulations under which shipments are received and transported, provides (Rule 7) that the name of only one shipper, one consignee and one destination may appear on a uniform railroad bill of lading, and (Rule 14) that only one uniform railroad bill of lading may be issued on a carload shipment and such shipment must be in one car, from one station made in one calendar day by one shipper for delivery to one consignee at one destination car to be loaded by shipper and unloaded by consignee (Exhibit "C", R. 36A).

respondent forwarder were tendered to a railroad the freight charges necessarily imposed by the railroad would be at the less-than-carload rate. The less-than-carload shipment could not be reshipped by the railroad at carload rates without violating the law (49 U. S. C. A. § 2 and § 1004(c)). The railroads do not and cannot transport a forwarder's consolidated carload shipment on the several less-than-carload bills of lading issued by the forwarder; but such rail transportation must be made on the uniform railroad bill of lading issued by the initial rail carrier to the forwarder covering the carload lot. So long as the forwarder obtains, on the forwarder's consolidated carload shipments, the carload rate from the rail carriers (a factor which establishes both the excuse for the existence of this two-sided character in the transportation industry, as well as the fact of the complete difference in identity between the consolidated carload shipment and its individual units) a uniform railroad bill of lading must be issued by the initial rail carrier to the forwarder. 49 U. S. C. A. 20(11). If the rail carrier did not actually issue a uniform railroad bill of lading, nevertheless the forwarder's shipment, being accepted as that of a shipper of a carload shipment moving by rail, the uniform railroad bill of lading being a part of its tariffs could not be waived by any such failure to issue. *New York Central R. Co.* v. *Lazarus*, 278 Fed. 900; *Sou. Pac. Co.* v. *Stewart*, 245 U. S. 359.

Even if the respondent were a carrier, its consolidated shipments could not be transported except under and pursuant to the terms of the uniform railroad bill of lading as issued by the initial rail carrier to the forwarder. If a rail carrier should assume to act as a shipper of a consolidated carload shipment it would not be entitled, as to that shipment, to any waiver of the claim clause in the uniform railroad bill of lading of the initial rail carrier accepting such consolidated carload shipment. A carrier cannot be made a favored shipper. *Interstate Commerce Commission* v. *Balt. & O. Ry.*, 225 U. S. 326, 346.

If the railroad received and transported as individual less-than-carload shipments each of the individual package shipments comprising the forwarder's consolidated bulk shipment, the regular railroad tariff less-than-carload rates would be applicable to each individual package shipment. The aggregate of this amount would be considerably greater than is the carload rate paid by respondent on the consolidated bulk carload shipment which it offers to the railroad as a "carload of mixed merchandise".

In other words, there are different shipments, different rate structures, different routes, different points of origin, different destinations, different shippers, different consignees, different divisions of freight charges, and the bills of lading are issued to different persons. The terms and conditions of the bills of lading issued by respondent or its agent and the uniform railroad bill of lading issued by the rail carrier receiving the consolidated carload shipment may be similar because respondent has presently adopted (see footnote, p. 2) a bill of lading similar to the uniform railroad bills of lading, but the bills of lading themselves show different points of origin, different shippers, different consignees, different shipments, different destinations, different routes and different freight charges.

All this comes about from the manner in which the shipments are tendered by the respondent to the rail carriers. The individual package is not tendered to the railroad for transportation pursuant to the terms of the forwarder's bill of lading. If it were the rail carriers could not accept the same because they cannot under the Interstate Commerce Act be parties to the through rates and routes provided for in a forwarder's tariffs (*Acme Fast Freight, Inc.* v. *U. S.*, 30 Fed. Supp. 968, at 973; aff. 309 U. S. 638).

It seems clear that the respondent cannot on the one hand, as shipper, tender carload shipments to the railroad for transportation pursuant to the uniform railroad bill of lading and thereby secure the benefit of the carload rates,

and on the other hand claim, at a later date, that the component parts of the carload shipments were moving under bills of lading previously issued by respondent and that the railroads are bound by the terms thereof.

POINT III

The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" of respondent and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable.

The *Ward* case (244 U. S. 383) is the leading case of a shipment delivered to a rail carrier by a shipper for transportation on a through uniform railroad bill of lading to a point on the line of another rail carrier. In that case the second rail carrier, although bound to receive the shipment as a connecting carrier, at the rate and upon the terms named in the original bill of lading issued to the shipper a new and second bill of lading covering the identical shipment.

Such is not the way in which forwarders and rail carriers do business with each other. In fact they cannot legally do business that way. The forwarder's tariff, filed pursuant to the provisions of Part IV, provides rates for the transportation of individual packages received by it from the point at which they are received from its shipper, for delivery to that shipper's consignee at final destination. The railroad cannot be a party to this rate, nor is it asked to be. The rail carrier does not issue to the forwarders' shipper a new uniform railroad bill of lading for the transportation of the single package shipment previously delivered to the forwarder and rarely does the forwarder's shipper know by what form of transportation his package is carried to his consignee at final destination. On the con-

trary, upon request of the forwarder, the rail carrier issues to the forwarder, not to the forwarder's shipper, a uniform railroad bill of lading for an entirely different shipment, a carload shipment, which the forwarder as shipper, not as receiving carrier, tenders to the railroad, in which uniform railroad bill of lading the railroad agrees to transport to a rail destination and there to deliver, not to the consignee named in the forwarder's bill of lading, but to the forwarder itself (R. 24, 25). The railroads do not even know who the shippers or consignees of the individual package shipments are, nor do they know the description of the contents thereof (R. 62).

The factual distinctions between the *Ward* and similar cases and the case of a forwarder vis-a-vis the rail carriers in connection with forwarder shipments are many. Among the most important are the following:

1. In the *Ward* case the shipment received by the initial carrier was the identical shipment tendered to and received by the connecting rail carrier. In the case of forwarder traffic the shipment tendered to the forwarder is a less-than-carload shipment and the shipment tendered to the rail carrier by the forwarder is a consolidation of many package shipments (R. 3).

2. In the *Ward* case the connecting rail carrier's uniform railroad bill of lading was issued to the shipper. In the case of forwarder traffic the rail carrier's uniform railroad bill of lading is issued to the forwarder and not to any of the forwarder's individual package shippers (R. 11).

3. In the *Ward* case the initial rail carrier charged the shipper a through rate which was paid by the shipper as agreed. This being a through rate the connecting carrier was held bound to transport the shipment "at the rate" named in the original uniform railroad bill of lading. In the case of forwarder traffic rail carriers are not bound to

transport the shipment upon the forwarder's through rate provided for in the forwarder's tariffs to which the rail carriers are not parties (R. 12). It would be illegal for rail carriers to do so. Rail carriers are bound to transport the carload shipments tendered to them by the forwarders at the carload rates provided for in their own tariffs. Should the rail carrier charge the original rate named in the individual package shipper's bill of lading there could be no profit in the forwarder business or financial justification for the forwarder's existence. The lower carload rate provides the new consideration for the issuance of the uniform railroad bill of lading (R. 13). The fact that there was no new consideration led to the decision in the *Ward* case.

4. In the *Ward* case the shipment was tendered to the connecting carrier for transportation to destination on the same route provided for in the uniform railroad bill of lading issued by the initial carrier. In connection with forwarder traffic there is no rail route specified in the forwarder's bill of lading issued to the individual package shipper. The shipper's route is via Acme, respondent may route the shipment over a motor truck line, a rail line or a combination of the two (R. 9, 10).

5. In the *Ward* case the destination of the uniform railroad bill of lading issued by the initial carrier and the destination in the uniform railroad bill of lading attempted to be issued by the connecting carrier was the same. In forwarder traffic the destination of the forwarder's bills issued to its package shippers are many and varied whereas there is a different destination in the uniform railroad bill of lading issued by the rail carrier to the forwarder (R. 10, 11).

6. In the *Ward* case the uniform railroad bill of lading issued by the initial carrier and the bill of lading attempted to be issued provide for delivery to the same consignee. In the case of forwarder traffic the consignees in the bills

of lading issued by the forwarder to its package shippers are many and different. In the case of the uniform railroad bill of lading issued to the forwarder as shipper, the shipment is consigned to the forwarder (R. 11).

7. In the *Ward* case the shipment was made on a through rate participated in by rail carriers. In the case of forwarder traffic the rail carriers in no way participated in the charges of the forwarder made to its individual package shipper (R. 13, 14).

In the face of these undisputed facts respondent asks that the actualities of the situation be disregarded and that the doctrine of the *Ward* case be applied to a situation to which it clearly was not intended to apply.

The District Court rejected this contention and was at pains to point out the inapplicability of the *Ward* case (R. 83, 84).

In reversing the District Court, the Court below seemed to feel that it was necessary that the doctrine of the *Ward* case be applied in order to give the forwarder a right of subrogation against the rail carrier. Otherwise, said the Court, Congress might be held to have imposed an insurer's liability upon the forwarder, without corresponding right of recourse against the rail carrier (R. 104). In this the Court was in error.

POINT IV

Respondent, a shipper as to the rail carriers, has no right-over against rail carriers under Section 20(11) as incorporated into Section 1013 of Part IV. Were respondent an "initial carrier" as to the railroads any claimed right-over under Section 20(12) is regulated, modified and limited by agreement *i. e.*, Section 2(b) of the uniform railroad bill of lading issued to respondent.

Respondent, by consolidating numerous small package shipments and shipping them in its own name as a carload lot gets the benefit of the low carload rates provided for in the tariffs of the rail carrier (R. 27). Were each of the individual shipments shipped at the rail carrier's less-than-carload rates, respondent could not do business at all, much less do business at a profit.

Can it be that respondent can secure, for its own account, the benefit of these low carload freight charges and, at the same time, repudiate the uniform railroad bill of lading contract incorporated in the classification and hitherto held to be an integral part of the rate structure of rail carriers regulated under Part I of the Act?

It is submitted, as a separate and independent argument that, even if the uniform railroad bill of lading be held to be void as to the forwarder's shipper, and even if the forwarder be held to be the initial or receiving carrier, nevertheless, the uniform railroad bill of lading can still be held valid and binding upon the forwarder as a contract between the forwarder, as initial or receiving carrier (or transportation company) and its "connecting" rail carriers.

As such a contract it can validly operate to regulate, limit or modify any right of subrogation or of recourse

found to have been vested in the forwarder under Section 1013. In other words, treating the forwarder as a carrier, there is nothing in the statute or common law, to prevent one carrier from making a contract with other carriers regulating and modifying their liability, *inter sese*.

The first part of the Carmack Amendment (Section 20 (11)) contains a familiar provision prohibiting the carrier from limiting its liability by receipt or bill of lading issued to the shipper. But the second part of that amendment (Section 20(12)), which gives the initial carrier a right of recourse against subsequent carriers, contains no such provision.

It is established in the law that a party having a right by statute may waive, limit or modify that right. As stated by Judge Ray in *Westinghouse Electric & Mfg. Co.* v. *Binghamton Railway Co.*, D. C. N. Y. 1919, 255 Fed. 378:

> "* * * There can be no valid and binding agreement to violate a law, but private legal obligations imposed by statute may be varied by an agreement which is not forbidden by law, or which is not in violation of or contrary to the public policy and spirit of the law."

Railroad carriers subject to Part I have for many years limited and modified the right-over provided by Section 20(12) by promulgating a set of rules for the settlement, prorating and reimbursement for claim payments made by the initial or delivering carrier pursuant to Section 20(11). These rules are commonly known as Freight Claim Rules and are on file with the Interstate Commerce Commission. Such rules are essential to make Section 20(12) workable in practice. Without them there would be chaos in adjustment of freight claim loss and damage. These Rules in some instances go far beyond the liabilities of railroad carriers *inter sese* under Section 20(12). For instance,

concealed damage and loss, and damage unlocated as to a particular railroad, where there are several participating in a movement, is proratable over all the carriers; but under Section 20(12) the railroad making the payment could only recover from the railroad responsible a well-nigh impossible task.

The existence for many years of the Freight Claim Rules is thus evidence that the right-over under (Section 20(12)) can be modified, as between themselves, by the initial and other rail carriers. (See footnote, p. 18, *supra*.) This respondent is not a party to such rules, but if it has a right-over, a right of subrogation, such right is none the less modified by another contract between respondent and the rail carriers. That other contract is the uniform railroad bill of lading issued by the first rail "connecting" carrier to respondent-forwarder, assumed to be the "receiving" carrier. The consideration for the contract is the carload rate which the forwarder pays the rail carrier, and the further consideration of a further reduced rate applicable to shipments subject to the terms of such contract (R. 35).

It is submitted that this uniform railroad bill of lading contract can and should be given effect as a contract between the forwarder as receiving carrier, or receiving transporation company, and the rail "connecting" carriers, and the result is to regulate and modify the statutory right of recourse or subrogation claimed to be granted the forwarder under Section 20(12) as incorporated into Part IV by Section 1013.

That contract contains a claim clause and the forwarder must comply with such clause before it can exercise any rights of recourse or of subrogation against the rail carrier.

The foregoing contention is the subject of a separate and independent defense, by way of confession and avoid-

ance, set up in petitioners' answers (R. 16, 30). The District Court, having found in favor of petitioners on the points previously discussed, did not pass on this contention. The Court below, however, in the last paragraph of its opinion (R. 105), rejected it.

It is difficult to comprehend the decision of the Court below on this point. Petitioners suggest that that Court erred in holding that the uniform railroad bill of lading, even if invalid as to the forwarder's shipper, could be treated as a contract between the forwarder and its "connecting" rail carriers. Certainly the Court did not appreciate this point when it suggested, in the last sentence of its opinion, that notice by the forwarder's shipper to the forwarder under the forwarder's bill of lading would be compliance by the forwarder with the requirement of notice contained in a different bill of lading contract between the forwarder and the rail carrier.

If, therefore, respondent be deemed an initial carrier and the rail carriers be deemed its "connecting" carriers, respondent's statutory rights against the rail carriers have been regulated by the uniform railroad bill of lading, accepted by respondent for a good consideration; and the respondent must comply with the claim clause contained therein.

CONCLUSION

Because there must be issued to respondent by petitioners, on each carload shipment of forwarder freight traffic, a uniform railroad bill of lading, respondent is bound by the terms and provisions thereof either (1) as shipper of a carload lot, or (2) as a contractor who has agreed, for a valuable consideration, namely the reduced carload freight rate, to the regulation, limitation and modification of any right-over under Section 20(12), and because the nine months notice of claim requirement is one of the terms and provisions of such uniform railroad bill of lading, the judgment and order of the court below should be reversed and judgment be ordered dismissing the complaint against petitioners.

Respectfully submitted,

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